87-170

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

WILLIAM COPLEY, *et al.*,
Appellants,

vs.

HEIL-QUAKER CORP., *et al.*,
Respondents.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Interstate Commerce Clause constitutionally prohibits a state from enacting legislation denying benefits of the state's statute of limitations to foreign corporations and others having no presence in the state and, if so, may such determination by a federal court be applied retroactively as grounds for summarily dismissing an otherwise timely commenced cause of action.

PARTIES

Present Appellants are: William Copley, Patsy Copley, his wife, and Dale Copley, their son. All were parties in all actions below.

Present Respondents are Heil-Quaker Corporation, Honeywell, Inc., Sears, Roebuck & Company, Frey & Sons and Phillips Bottled Gas Company.

Anthony Celebrezze, Jr., the Attorney General of the State of Ohio, is being included as a respondent pursuant to the Rule 28.4(c) of the Rules of the Supreme Court of the United States. This is a proceeding wherein the constitutionality of a statute of the State of Ohio has been drawn in question. The lower courts did not, pursuant to 28 U.S.C. Section 2403(b), certify to the Attorney General of the State of Ohio the fact that the constitutionality of Ohio Revised Code Section 2305.15 was drawn in question.

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No.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit below has not been reported. The case is *Copley, et al. v. Heil-Quaker Corp., et al.*, No. 86-3360 (6th Cir. May 20, 1987). The Memorandum and Order of the Federal District Court for the Northern District of Ohio dismissing Heil-Quaker Corp. as a defendant has also not been published. *Memorandum and Order, Copley, et al. v. Heil-Quaker Corp., et al.*, No. 82-512 (N.D. Ohio. March 8, 1984). Both opinions are included in the appendix.

JURISDICTION

The Copleys invoke the Court's appellate jurisdiction under 28 U.S.C. Section 1254(2) because a federal court of appeals has held an Ohio statute invalid. Alternatively, if this Court were to determine that it does not have appellate jurisdiction, the appellants invoke this Court's certiorari jurisdiction under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the United States Constitution (the Commerce Clause) provides, in relevant part, as follows:

> "The Congress shall have Power
>
> . . .
>
> to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ." United States Constitution, Article I, Section 8.

28 U.S.C. Section 1254(2) provides in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> . . . .
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . ." 28 U.S.C. Section 1254 (1982).

The state statute attacked by Heil-Quaker Corp. upon which the Copleys relied for the proposition that their

original complaint was timely filed is Ohio Revised Code Section 2305.15 which provides, in relevant part, the following:

> "When a cause of action accrues against a person if he is out of state, or has absconded, or conceals himself, the period of limitations for the commencement of the action . . . does not begin to run until he comes into the state or while he is so absconded or concealed." Ohio Revised Code Section 2305.15 (Page, 1987).

It is this statute which the Court of Appeals for the Sixth Circuit found to be an unconstitutional restriction on interstate commerce in the opinion below.

STATEMENT OF THE CASE

On August 24, 1982, William, Patsy and Dale Copley (hereinafter referred to simply as "the Copleys") commenced an action in the United States District Court for the Northern District of Ohio. The action was commenced for indisputable and admittedly serious injuries. The Copleys' injuries were inflicted on December 12, 1975 when the furnace servicing the Copley residence exploded.

The Copley furnace was manufactured by the defendant, Heil-Quaker Corporation (hereinafter referred to simply as "Heil"). Neither the furnace itself nor any accompanying literature identified Heil as the manufacturer of the furnace.

Heil is a Delaware corporation which manufactures furnaces in Tennessee. The furnace was sold in Ohio and other states of the Union. The purely interstate character of Heil's commercial activities in the State of Ohio was not and is not disputed.

No one disputes that the Copleys' cause of action was timely commenced pursuant to Ohio Revised Code Ann. Section 2305.15 (hereinafter referred to simply as the "Ohio Savings Statute").

The Ohio Savings Statute provides that limitation periods otherwise applicable to Ohio causes of action are tolled as to foreign corporations and other defendants that have no presence in the State of Ohio or are otherwise not amenable to service within the State of Ohio.

Notwithstanding the otherwise timely commencement of the Copleys' action, the Federal District Court, upon motion by Heil, summarily dismissed the action against Heil. The Federal District Court found that the Ohio Savings Statute was unenforceable because it created a constitutionally impermissble burden on interstate commerce.

On May 20, 1987, the Sixth Circuit Court of Appeals affirmed the Federal District Court and the within appeal was taken pursuant to 28 U.S.C. Section 1254(2).

REASONS WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO REQUIRE PLENARY APPELLATE CONSIDERATION

I. The United States Supreme Court has already ruled that the question is substantial. G. D. Searle & Company v. Cohn, 455 U.S. 404 (1982).

In *Searle*, 455 U.S. 404[1], this Court was confronted with the identical issue raised herein. In their complaint, the Cohns had claimed injuries as a result of a drug manufactured by G. D. Searle Company and sold to plaintiffs in New Jersey. G. D. Searle Company's activities in New Jersey were strictly interstate in character.

The Cohns failed to commence their cause of action for nine (9) years after their injuries were incurred. The New Jersey statute of limitations requires claims for personal injuries to be commenced within two (2) years of the alleged injury. The Cohns nevertheless claimed timely commencement of their action under New Jersey's tolling statute which, like the Ohio Savings Statute, tolls all statutes of limitation as to defendants who are not present or otherwise amenable to service within the state.

The Third Circuit Court of Appeals in *Cohn v. G. D. Searle & Co., sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980) agreed with the Cohns and G. D. Searle & Co. petitioned for a writ of certiorari seeking a review by the United States Supreme Court. The

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1. All references hereinafter to *Searle* will be to the United States Supreme Court decision at 455 U.S. 404. Prior to and subsequent to the decision published in 455 U.S. 404, there were four other published decisions involving the same parties. For the sake of clarity, all cases other than *Searle* involving the same parties will be given an actual citation.

petition challenged the constitutionality of the New Jersey tolling statute, alleging said statute:

(a) violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(b) violated the Interstate Commerce Clause of the United States Constitution.

This Court held that the New Jersey tolling statute did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. However, the Court was unable to address the Commerce Clause challenge for reasons the Court did not anticipate when it granted the petition.

After consideration of briefs on the merits and oral argument, the Court determined that it could not address the Commerce Clause challenge because both the petitioner in its brief seeking certiorari and the respondents in their brief opposing certiorari failed to bring to the Court's attention procedural matters which required remand. *Searle*, 455 U.S. at 413.

Specifically, in response to the plenary briefs and oral hearing, this Court determined that the Third Circuit: (1) had not specifically addressed the Commerce Clause issue; and (2) had not determined whether the New Jersey tolling statute required a foreign corporation to register to do business in order to obtain benefits of the New Jersey statute of limitation. Because of this unanticipated lack of ripeness[2], the constitutional chal-

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2. Justice Powell, with Chief Justice Burger joining, in a separate opinion argued that the challenge of the New Jersey statute based upon the Interstate Commerce Clause was ripe for determination and opined that "With full knowledge that the Court of Appeals had ignored petitioner's Commerce Clause argument, we granted certiorari. Our grant did not limit the questions presented." *Searle*, 455 U.S. at 415.

lenge based on the Interstate Commerce Clause, although fully briefed and argued, was remanded.

Justice Blackmun, writing the majority opinion, stated the reason why the writ had been granted. With the concurrence of all nine justices[3], Justice Blackmun stated:

> **"Because of the novel and substantial character of the federal issue involved, we granted certiorari. . . ."** *Searle*, 455 U.S. at 408. (emphasis added)

The Copleys' jurisdictional appeal provides this Court with an opportunity to decide a question which the Court unanimously considered substantial and which two justices considered decisional.

II. Plenary consideration was given to Searle in response to a petition for certiorari. The Copleys' jurisdictional appeal on the identical issue should be briefed and orally argued.

In contrast to *Searle*, the Copleys' appeal is from the decision of a federal court declaring the Ohio Savings Statute unconstitutional.

Because the Third Circuit had ruled in favor of the Cohns, the New Jersey tolling statute had not been declared unconstitutional. G. D. Searle & Co.'s only recourse therefore was to petition the United States Supreme Court for a writ of certiorari. Granting the writ was purely discretionary. It was nonetheless granted because the question was patently substantial. Not only did the Court grant the writ, but it was accorded a

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3. Justice Powell and Justice Stevens wrote separate opinions. Both separate opinions expressed disagreement with the majority's decision to remand. However, both separate opinions agreed that the question was substantial.

plenary review with briefs on the merits and oral argument.

Here, the Sixth Circuit found the Ohio Savings Statute to be an unconstitutional infringement on the Interstate Commerce Clause. In doing so, the Court summarily dismissed the Copleys' otherwise timely commenced cause of action. Because the lower court's decision struck down a state statute, the Copleys are statutorily entitled to a review by the United States Supreme Court. *See* 28 U.S.C. Section 1254(2). *A fortiori,* the Copleys are entitled to the plenary review of their jurisdictional appeal which this Court, in its discretion, granted G. D. Searle & Co.

III. The substantial character of the question in Searle was analyzed by this Court.

As this Court opined in *Searle,* the question here involves balancing the sovereign right of a state to protect a citizen's right to recover for injury caused by an absent defendant versus the rights of manufacturers and vendors whose contacts with the subject state are purely interstate in character. Appellants argue that the reasoning of the Court in *Searle* in response to the issue of equal protection and due process should be adopted herein. The *Searle* decision held:

> "In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. (citation omitted) The New Jersey tolling provision need satisfy only this constitutional minimum. As the Court explained in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945):

> '[Statutes of limitation] represent public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.'" *Searle*, 455 U.S. at 408.

> "When the statute is examined under the Equal Protection Clause, it survives petitioner's constitutional challenge because rational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served." *Searle*, 455 U.S. at 410.

In contrast, Heil argues that the Ohio Savings Statute represents an unconstitutional interference with interstate commerce. Heil argues that the Ohio Savings Statute requires foreign corporations to either obtain licensure in Ohio or be denied the benefits of Ohio's statutes of limitation. Heil therefore argues that it is forced to potentially abandon jurisdictional defenses that might otherwise be available to it in actions commenced in Ohio. As such, Heil argues that the Ohio Savings Statute is an infringement on interstate commerce. As Justice Powell stated in his separate opinion in *Searle*:

> **"This squarely presents the serious question whether the consequences of registration in the State, solely to obtain the protection of the statute of limitations, unduly burden interstate commerce."** *Searle,* 455 U.S. at 419. (emphasis added)

Inasmuch as the *Searle* decision documents this Court's unanimous agreement that the question is substantial, the Copleys' jurisdictional appeal should be given plenary consideration.

IV. The judicial history of the Commerce Clause question following remand in Searle affirms the wisdom of this Court's decision finding the question to be substantial.

Immediately following the *Searle* remand on February 4, 1982, this Court issued two memorandum opinions remanding two other cases seeking writs on the identical issue.

1. On March 1, 1982, *Kelsey-Hayes, Inc. v. Roy Hopkins*, 455 U.S. 985 (1982), was, like *Searle*, remanded to the Third Circuit "for further consideration in light of [*Searle*]". *Id.* Said decision will hereinafter be referred to simply as "*Kelsey*".

2. On March 8, 1982, *Honda Motor Company Ltd. v. Walter P. Coons*, 455 U.S. 996 (1982), was remanded to the Supreme Court of New Jersey "for further consideration in light of [*Searle*]". *Id.* Said decision will hereinafter be referred to simply as "*Coons*".

The remand of *Searle* and *Kelsey* to the lower federal courts and the remand of *Coons* to the New Jersey state courts spawned 10 published decisions and at least one significant unpublished decision.

The rules requiring brevity in a jurisdictional statement permit only the most cursory summary of the judicial history after the aforesaid remands. In chronological order, that cursory history follows.

Case No. 1: *McKinley v. Combustion Engineering, Inc.*, 674 F.2d 812 (9th Cir. 1982)

Decided April 15, 1982.

The Ninth Circuit remanded to the Federal District Court the issue of whether Combustion Engineering, Inc., was barred from asserting the defense of statute of limitations. The Court held that Idaho tolling statutes are very similar to those that recently confronted the Supreme Court in *Searle*. *McKinley*, 674 F.2d at 816. The Ninth Circuit therefore remanded the issue to the Federal District Court for "threshold determination of these statutes' validity under the Commerce Clause." *Id.*

Case No. 2: *Walter P. Coons v. American Honda Motor Co., Inc.*, 94 N.J. 307, 463 A.2d 921 (1983) (hereinafter referred to simply as "*Coons I*"[4])

Decided August 3, 1983.

The New Jersey Supreme Court resolved the ambiguity (i.e. the ambiguity noted by this Court in *Searle*) with respect to the New Jersey tolling statute. Specifically, the New Jersey Supreme Court found the New

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4. Subsequent decisions by other courts have thumbnailed this initial New Jersey Supreme Court decision as *Coons I* to distinguish it from *Coons II*. *Coons II* is a subsequent decision by the New Jersey Supreme Court holding, on rehearing, that its decision in *Coons I* would operate prospectively. Inasmuch as all subsequent decisions refer to these two holdings as *Coons I* and *Coons II*, appellants will do likewise herein.

Jersey tolling statute requires licensure. Because of the licensure requirement, the Court held, in a 4 to 3 decision, that the New Jersey tolling statute violates the Commerce Clause.

Case No. 3: *McKinley v. Combustion Engineering, Inc.*, 575 F. Supp. 942 (D. Id. 1983)

Decided November 15, 1983.

The Federal District Court declared the Idaho tolling statute an unconstitutional infringement of the Commerce Clause.

Case No. 4: *Walter P. Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 476 A.2d 763 (1984)

Decided June 13, 1984.

This decision is *Coons II*. *See* n. 4, *supra*. On rehearing of *Coons I*, the New Jersey Supreme Court modified its decision to give it prospective effect only.

Case No. 5: *McKinley v. Combustion Engineering, Inc.*, Case No. 84-3505 (9th Cir. Oct. 1, 1984)

Decided October 1, 1984.

In an unpublished decision, the Ninth Circuit reversed the holding of the Federal District Court. *See* Case No. 3, *supra*. The decision interpreted the Idaho tolling statute as requiring registration only for those foreign corporations having minimum contacts with Idaho and the statute therefore did not create an impermissible burden on interstate commerce.

Case No. 6: *Cohn v. G. D. Searle & Co.*, 598 F. Supp. 965 (D. N.J. 1984)

Decided December 7, 1984.

When *Searle* was remanded to the Third Circuit, the Third Circuit remanded to the Federal District Court. On remand, the Federal District Court adopted the holding in *Coons I* (holding New Jersey tolling statute unconstitutional under Commerce Clause), but rejected *Coons II* as controlling because the finding of prospectivity in *Coons II* was based on state law. Applying federal law as enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court held that *Coons I* would be retroactively applied by the federal courts. G. D. Searle & Co.'s motion to dismiss was granted. This decision was later reversed by the Third Circuit. *See* Case No. 9, *infra*.

Case No. 7: *Honda Motor Co. Ltd. v. Walter P. Coons*, and *Walter P. Coons v. Honda Motor Co. Ltd.*, 469 U.S. 1123 (1985)

Decided January 7, 1985.

The United States Supreme Court denied a writ of certiorari to petitioner, Honda Motor Co., Ltd., and also denied a writ to cross-petitioner, Coons. Justice Rehnquist, now Chief Justice, wrote a dissenting opinion urging the Court to grant the writ sought by the cross-petitioner. Justice Rehnquist urged granting of the writ for the following reasons:

1. The New Jersey Supreme Court resolved the ambiguity in the New Jersey tolling statute. 469 U.S. at 1124.

2. The New Jersey Supreme Court, in a 4 to 3 decision "has gone beyond any of our Commerce Clause decisions." *Id.*

3. The purpose of the New Jersey statute is "to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve." *Id.* at 1126.

4. "The statute does not place an insuperable burden on a foreign corporation because the foreign corporation may plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself." *Id.*

5. "The impact on interstate commerce . . . is fairly negligible." *Id.*

6. The New Jersey tolling statute "does not so scarcely benefit local interests and so clearly burden interstate commerce that we should decline the opportunity to review this *constitutional issue of first impression.* *Id.* at 1127. (emphasis added)

Case No. 8: *Love v. Johns-Manville Canada, Inc.*, 609 F. Supp. 1457 (D. N.J. 1985)

Decided May 29, 1985.

For reasons not articulated in its decision, the same Federal District Court that decided Case No. 6, *supra*, arrived six months later at a diametrically different conclusion. This decision applied federal law as enunciated by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), but applying the *Chevron* test held that *Coons I* should be applied prospectively.

Case No. 9: *Cohn v. G. D. Searle & Co.*, 784 F.2d 460 (3rd Cir. 1986)

Decided January 7, 1986.

The Third Circuit reversed the Federal District Court's decision in Case No. 6, *supra*. Applying the *Chevron* test, the Third Circuit adopted the reasoning enunciated in *Coons II*. Prospective application only was given to *Coons I*. Cohns' cause of action was preserved. The Court noted:

> "Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive." *Id.* at 465.

Case No. 10: *G. D. Searle & Co. v. Susan Cohn*, 55 U.S.L.W. 3257 (1986)

Decided October 14, 1986.

A writ of certiorari was sought by G. D. Searle & Co. seeking review of the Third Circuit decision giving prospective application only to the finding that New Jersey's tolling statute unconstitutionally infringed on interstate commerce. The petition was denied.

Case No. 11: *Copley, et al. v. Heil-Quaker, Corp., et al.*, No. 86-3360 (6th Cir. May 20, 1987)

Decided May 20, 1987.

The Sixth Circuit Court of Appeals struck down the Ohio Savings Statute as an unconstitutional infringement on interstate commerce. The decision was applied retroactively and the Copleys' cause of action was summarily dismissed.

Case No. 12: *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, 820 F.2d 186 (6th Cir. 1987)

Decided June 3, 1987.

The Sixth Circuit consolidated this appeal with the Copleys' appeal because the identical Commerce Clause question was presented. Bendix's claim was also summarily dismissed. In summarily dismissing the Bendix cause of action, the Court stated: "We agree with the district court that the reasoning of *Coons* and *McKinley* should be applied to the case at hand." *Id.* at 188. The reference to *Coons* is to Case No. 2, *supra*, and the reference to *McKinley* is to Case No. 3, *supra*. Therefore, the Sixth Circuit adopted the reasoning of two cases, both of which were later reversed. See Case Nos. 4 and 5, *supra*.

CONCLUSION

There are compelling reasons for giving plenary review to the Copleys. The reasons are summarized herein.

1. The granting of petitions for writs of certiorari is discretionary. Exercising that discretion, writs issued in *Searle, Kelsey* and *Coons* on the identical question herein. No lesser consideration should be given to a jurisdictional appeal.

2. This Court in *Searle* unanimously opined that the question is substantial. The Court could not address the admittedly substantial question because of lack of ripeness. No such problem exists here.

3. The holding by the Sixth Circuit deprived the Copleys of any remedy whatsoever. In the entire judicial history of the question herein, the Copleys are unique in that regard. By way of example, the writ granted G. D. Searle & Co. involved a finding which impacted on only one of many potential defenses available to G. D. Searle & Co. Notwithstanding the *Searle* decision, G. D. Searle & Co. received a day in court. The Copleys have not.

4. The Copleys' appeal not only presents an opportunity to review the threshold issue of whether tolling statutes violate the Commerce Clause but provides the further opportunity to review an inevitable correlated issue, i.e. if tolling statutes are violative of the Commerce Clause, should such holdings operate prospectively or retroactively.

5. With respect to the retroactivity issue, there is now a conflict between two federal courts of appeal (i.e. the Third Circuit and the Sixth Circuit), as well as a conflict between a federal court of appeals (i.e. the Sixth

Circuit) and a state court of last resort (i.e. the New Jersey Supreme Court). Either of these conflicts in and of itself is grounds suggesting a plenary review. *Rules of the Supreme Court of the United States,* Rule 17(A) and 17(B).

6. The two cases upon which the Federal District Court relied to summarily dismiss the Copleys' cause of action were both reversed. The Federal District Court cited *Coons I* and *McKinley v. Combustion Engineering, Inc.,* 575 F. Supp. 1942 (1983) in reaching the decision to summarily dismiss the Copleys' cause of action. Both of said cases were reversed. *See* Case No. 4 and Case No. 5, *supra.* Nonetheless, the Sixth Circuit affirmed the District Court.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 20, 1987)

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY; PATSY COPLEY; and DALE COPLEY,
Plaintiffs-Appellants,

v.

HEIL-QUAKER CORPORATION; HONEYWELL, INC.; SEARS, ROEBUCK & COMPANY; PHILLIPS BOTTLED GAS COMPANY; and FREY & SONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: MARTIN, JONES, and MILBURN, *Circuit Judges.*

PER CURIAM. This case stems from injuries sustained by William Copley when a gas furnace exploded in his home. Copley, his wife, and son appeal the district court's entry of summary judgment for the defendants based on the Copleys' failure to comply with the statute of limitations. We affirm.

In December 1975 Copley awoke to find his furnace inoperative. He went to the basement where he smelled

liquid propane gas and heard a hissing noise. He manually closed the gas valve and attempted to turn on an electric fan to disburse the gas prior to relighting the pilot light. A spark from the fan ignited the gas and Copley was severely burned.

The furnace was manufactured by Heil-Quaker, a Delaware corporation with its principal place of business in Tennessee. The gas valve was manufactured by Honeywell, Inc., a Delaware corporation with its principal place of business in Minnesota.

The Copleys filed a personal injury action against Heil-Quaker in federal court in Ohio in August 1982. They filed a common law action for negligence and breach of warranty against Honeywell in federal court in Minnesota in September 1982. Also in September they amended their Ohio complaint to assert a statutory claim against Honeywell, alleging violation of the Consumer Product Safety Commission's reporting rules. The Minnesota cause of action was transferred to Ohio and the cases consolidated. The district court granted summary judgment to both defendants based on its determination that the claims were time-barred.

The statute of limitations for personal injury actions in Ohio is two years. Ohio Rev. Code § 2305.10. The statutory period under Minnesota law for the common law claims is six years for negligence and four years for breach of warranty. Minn. Stat. §§ 541.05(5), 336.2-725. Minnesota law determines the applicable period for these claims because of the general federal rule, as applied in this circuit, that when diversity actions are transferred for the convenience of the parties under 28 U.S.C. § 1404(a), the state law of the transferor court should be applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

The Copleys filed suit in September 1982, approximately six years and nine months after the December 1975 explosion. They argue that their complaint against Honeywell is timely, however, because the limitations period should be tolled under the doctrine of fraudulent concealment. We find this argument unpersuasive. The doctrine of fraudulent concealment is commonly applied in instances where a defendant by fraud has prevented a plaintiff from learning of his cause of action. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45 (Minn. 1982); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 92 N.W.2d 96 (1958). In such cases, the statute of limitations is tolled until the cause of action is discovered or could have been discovered through due dilligence. In the current case plaintiffs knew Copley had been injured at the time of the explosion and knew immediately that the source of his injury was the furnace. Shortly after the accident, a plumber told Patsy Copley that in his opinion the explosion was caused by the Honeywell valve. He retained the valve in the event she later needed it. Thus, even assuming that Honeywell did act fraudulently, its conduct did not prevent the Copleys from uncovering material facts necessary to the commencement of their action.

William Copley also argues that the limitations period should be tolled because of his alleged disability as a result of the explosion. However, under Minnesota law a plaintiff's disability

> existing at the time when a cause of action accrued or arising anytime during the period of limitation, shall suspend the running of the period of limitation until the same is removed; provided that such period, except in the case of infancy, shall not be extended for more than five years, nor in any case for more than one year after the disability ceases . . . .

Minn. Stat. § 541.15. Thus, William Copley, who was allegedly disabled until March 1980, would have had until March 1981 to file his claim. The claim of his son, who reached majority in December 1976, is also time-barred under the statute.

Further, we find the Copleys' statutory complaint seeking damages for violations of the reporting requirements of the Consumer Product Safety Commission, 15 U.S.C. § 2064(b), to be controlled by the reasoning stated in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986) (failure to comply with the Commission's reporting rules does not give rise to a private cause of action). Accordingly, the claims against Honeywell were properly dismissed by the district court.

With regard to the Copleys' claim against Heil-Quaker, the cause of action for personal injury accrued at the time of the accident. The applicable limitations period is two years. Mrs. Copley's cause of action commenced to run immediately, Mr. Copley's commenced, at the latest, on the cessation of his alleged incapacity in March 1980, and Dale Copley's commenced when he reached majority. Thus, even if each is given the benefit of Ohio's disability statute, Ohio Rev. Code § 2305.16, none was timely when filed in September 1982.

Finally, plaintiffs argue that Heil-Quaker should not be permitted to have the benefit of Ohio's statute of limitations unless and until it obtains a license to do business in Ohio. Because we find the application of Ohio's saving clause, Ohio Rev. Code § 2305.15, to be in violation of the commerce clause of the Constitution, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, No. 85-3784 (6th Cir. May ...., 1987), we affirm the decision of the district court dismissing as untimely plaintiffs' claim against Heil-Quaker.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 8, 1984)

Case No. C 82-512

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM COPLEY, *et al.*,
Plaintiffs,

vs.

HEIL-QUAKER CORP., *et al.*,
Defendants.

MEMORANDUM AND ORDER

POTTER, *J.*:

This matter is before the Court on defendant Heil-Quaker Corporation's (hereinafter "Heil-Quaker") motion to dismiss and plaintiffs' opposition thereto, defendant Heil-Quaker's reply, plaintiffs' response, opposition of Bendix, *amicus curiae* to defendant's motion to dismiss, reply by defendant Heil-Quaker, further opposition by Bendix, supplemental response of plaintiffs and defendant Heil-Quaker's supplemental response.

Subsequent to the filing of these motions, the Court has become aware of another case on its docket, William Copley, et al., v. Honeywell, Inc., et al., No. C 83-682. This case was transferred to this Court from the District of Minnesota, Fourth Division, pursuant to the provisions

of 28 U.S.C. §1404(a). Plaintiffs have filed substantially the same claims with that Court as they filed in the case sub judice. Therefore, the Court will order that Case Nos. C 83-682 and C 82-512 be consolidated.

A hearing was held on defendant Heil-Quaker's motion for summary judgment on May 20, 1983. The issues herein were presented on the pleadings, memoranda, affidavits and oral arguments.

This action arises out of a gas explosion that occurred on December 12, 1975. Plaintiffs William Copley and Patsy Copley are husband and wife, and are the parents of plaintiff Dale Copley who was born on December 2, 1958. All three plaintiffs are residents and citizens of the State of Ohio.

The complaint herein was filed on August 24, 1982. As amended, it alleges that in 1967 plaintiffs William and Patsy Copley purchased a furnace manufactured by Heil-Quaker and installed it in their home. It further alleges that on December 12, 1975, serious injuries were inflicted upon the plaintiffs by a gas explosion allegedly caused by a malfunction of the furnace. The plaintiffs allege that Heil-Quaker manufactured the furnace and negligently incorporated a defective and malfunctioning control or valve which directly and proximately resulted in the injuries and damages sustained by the plaintiffs. The allegedly defective gas control or valve was manufactured by Honeywell, incorporated into the furnace manufactured by Heil-Quaker and sold to the plaintiffs by Sears.

Heil-Quaker is a Delaware corporation having its principal place of business in Tennessee and manufactures furnaces, central air conditioning equipment, heat pumps, and parts thereof. Its manufacturing operations are con-

ducted only in the State of Tennessee, and the products it manufactures there are shipped for resale to purchasers located in every state of the United States, including Ohio. Heil-Quaker is licensed to do business and has appointed agents for service of process upon it only in Delaware and Tennessee.

No place of business, officer, managing agent or general agent of Heil-Quaker is located in the State of Ohio. From time to time, sales representatives of Heil-Quaker call on customers in Ohio to promote the sale of the company's products, sometimes taking orders subject to acceptance at the company's office in Tennessee. A service representative of Heil-Quaker also calls on customers in Ohio from time to time. Affidavit of Charles L. Shattuck.

Relief against Heil-Quaker is sought by the first, second, third and fourth causes of action which seek to recover for personal injuries to William and Dale Copley, their lost past and future earnings and medical expenses, Patsy Copley's loss of the consortium of her husband, and William and Patsy Copley's loss of services of Dale Copley.

All of the claims against Heil-Quaker seek recovery for bodily injury and its consequences and are, therefore, subject to O.R.C. §2305.10 which provides in pertinent part:

> An action for bodily injury . . . shall be brought within two years after the causes thereof arose.

The explosion which caused the bodily injuries occurred on December 12, 1975, and plaintiffs William and Patsy Copley therefore had two years to assert their claims

against Heil-Quaker, until December 12, 1977. Since Dale Copley was born on December 2, 1958, he was seventeen years old and a minor on the date of the explosion. O.R.C. §2305.16 provides that, as to him, the two-year period of limitations would commence to run when his minority terminated. Thus his time to assert his claim against Heil-Quaker was two years from his eighteenth birthday. O.R.C. §3109.01. He became eighteen on December 2, 1976 and thus had until December 2, 1978 to assert his claims against Heil-Quaker.

Clearly, the plaintiffs' claims against Heil-Quaker were too late when this action was filed on August 24, 1982 and would be barred without the effect of the Ohio savings clause, O.R.C. §2305.15. That section provides in pertinent part:

> When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, . . . does not begin to run until he comes into the state or while he is so absconded or concealed . . . .

This provision has been construed to toll limitations when the defendant, including a corporate defendant, is not amenable to personal service of process within the borders of the State of Ohio, even though continuously amenable to "long-arm" service outside the state. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971); *Ohio Brass Company v. Allied Products Corporation*, 339 F. Supp. 417 (N.D. Ohio 1972). Heil-Quaker argues that §2305.15. as construed in Ohio and as applied to a corporation in the position of Heil-Quaker violates the Due Process

Clause of the Fourteenth Amendment and the Commerce Clause.[1]

Heil-Quaker asserts that §2305.15 violates the Due Process Clause because it conditions the benefit of the limitation period upon the appointment of an Ohio agent. Heil-Quaker asserts that the only way a foreign corporation can appoint an agent for service of process is to register to do business pursuant to O.R.C. §1703.04. Such registration to do business and appointment of an agent would subject it to suit in Ohio when there otherwise would not be the minimum contract required for suit in Ohio. Under the Due Process Clause and the "minimum contacts" rule of *International Shoe Co. v. Washington*, 326 U.S. 310, (1945), Heil-Quaker further argues that §2305.15 violates the Due Process requirement of notice and fair warning because the contradictory nature of the Ohio laws, specifically §1703.02 and §2305.15, constitute a trap for unwary sellers.

Heil-Quaker also asserts that §2305.15 violates the Commerce Clause prohibition of discrimination against interstate firms solely because of the interstate nature of their businesses. Finally, Heil-Quaker argues that §2305.15 violates the Commerce Clause requirement that any burden imposed upon commerce be justified by a countervailing local interest.

The Court will first consider defendant Heil-Quaker's arguments regarding the Commerce Clause. The Supreme Court has applied two tests in analyzing whether a state statute violates the Commerce Clause. The Supreme Court

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1. The argument that the provisions of O.R.C. §2305.15 violate the Due Process Clause and the Commerce Clause of the United States Constitution were not considered by the Ohio Supreme Court in *Seeley*.

has held that certain state statutes impose burdens on interstate commerce which are so substantial, direct and unjustified that the Supreme Court has held that the state statute is *per se* violative of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974); *Pike v. Brice* [sic] *Church, Inc.*, 397 U.S. 137, 142 (1970). The second test is a balancing test. If a state statute regulates even handedly and imposes only incidental burdens on interstate commerce, the state statute may still be found to violate the Commerce Clause if the burden imposed on interstate commerce is clearly excessive when balanced against the benefit to the state of the statute. *Pike v. Brice* [sic] *Church, Inc., supra*, at 142. In applying the balancing test, the nature of the local interest and whether this interest can be promoted as well with a lesser impact on interstate commerce should be considered. *Pike v. Brice* [sic] *Church, Inc., supra*, at 142.

Two courts have recently considered statutes of other states which contained similar provisions as O.R.C. §2305.15 and have found these provisions violated the Commerce Clause. In *Coons v. American Honda Motor Company, Inc.*, 94 N.J. 307, 463 A2d 921 (1983), the New Jersey Supreme Court held that New Jersey's tolling statute, *N.J.S.A.* 2A:14-22, was unconstitutional.

The issue in *Coons* arose when the United States Supreme Court, after initially agreeing to hear the appeal of one of the parties, remanded the case to the New Jersey court because of its decision in *G. D. Searle Co. v. Cohn*, 455 U.S. 404 (1982). In *Searle* the Supreme Court held that tolling provisions such as those contained in *N.J.S.A.* 2A:14-22 or O.R.C. §2305.15 do not violate the Equal Protection Clause. However, because of ambiguities in state law, the Supreme Court remanded the issue to state court

for consideration of the issue of whether such provisions violate the Commerce Clause.

The New Jersey Supreme Court first held that neither the statutes nor the Court rules permit a corporation to appoint a representative to receive service of process without registering to do business in the state, and that any attempt to so file with the Secretary of State must be without effect. The Court then held that since the tolling statute mandates licensing in New Jersey in order to get its benefits the statute violates the Commerce Clause. In reaching this conclusion, the court relied on a series of Supreme Court decisions which have found a per se violation of the Commerce Clause where a state has discriminated against a foreign corporation engaged in interstate commerce merely because it has failed to do business in that state.

In a footnote the court in *Coons* indicates that even if it applied a balancing test, it would still find that the provisions of *N.J.S.A.* 2A:14-22 violate the Commerce Clause. According to the court, the burdens attached to the requirement of obtaining certification to register to do business to avoid the tolling of the statute of limitations outweigh the benefits arising from the tolling provision.

The other court which has recently ruled upon this issue is the United States District Court for the District of Idaho in *Richard Dean McKinley v. Combustion Engineering, Inc., et al.*, Civil No. 80-4045, filed November 15, 1983. In *McKinley* the court had dismissed the plaintiff's wrongful death claims on the grounds they were barred by the statute of limitations. The dismissal was appealed to the Ninth Circuit. The Ninth Circuit, because of the Supreme Court's decision in *G. D. Searle & Co. v. Cohn, supra*, remanded the case to the district court for a

decision on whether a former provision of Idaho Code 30-509 violated the Commerce Clause. The provisions of Idaho Code 30-509 were as follows:

> *Statute of limitations.*—Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as foresaid, upon whom such service can be made, shall be within the state.

Subsequent to the filing of the lawsuit, this statute was repealed.

The court in *McKinley* first discussed the court's decision in *Coons*. The court in *McKinley* then examined Idaho law in order to determine the burden which the Idaho tolling statute placed upon foreign corporations. The court found that the tolling statute forced foreign corporations in Idaho to choose between either exposing itself to personal jurisdiction in the Idaho courts by complying with the tolling statute or being liable in perpetuity for all lawsuits filed against it under Idaho state law. The court in *McKinley* agreed with the court in *Coons* that if a *per se* rule was employed the burden imposed by the tolling statutes on foreign corporations would violate the Commerce Clause. According to the court in *McKinley*, however, a *per se* rule was inapplicable because under existing Idaho case law the tolling statute could not be found to apply to firms engaged exclusively in interstate commerce.

The court in *McKinley* therefore utilized a balancing test and analyzed whether the burdens on interstate com-

merce imposed by the Idaho tolling statute outweigh the benefits of the statute. The court rejected the argument that no real burden was imposed upon a foreign corporation by forcing it to register in order to avoid forever being liable on state causes of action because a foreign corporation was already subject to personal jurisdiction under the Idaho long arm statute. According to the court in *McKinley,* the law on minimum contacts is not crystal clear. The standards which the courts have utilized in determining whether personal jurisdiction exists raise questions regarding "what constitutes substantial activities," "when will a single act be sufficient" and "what is reasonable." Therefore, foreign corporations doing business in Idaho may have an arguable defense based upon lack of personal jurisdiction. The provisions of Idaho Code 30-509 require a corporation to waive this defense and therefore impose a real burden upon foreign corporations which seek to avoid perpetual liability in Idaho.

The court in *McKinley* found that the benefit of requiring foreign corporations to appoint in-state representatives for service of process purposes is to make it easier for Idaho residents to effect service on a foreign corporation, resulting in a time and cost savings. According to the court in *McKinley,* this benefit, however, is outweighed by the burden of waiving a legal defense. A successful motion to dismiss for lack of personal jurisdiction can end possibly protracted litigation.

In addition, the court found that the benefits of the Idaho tolling statute could have been obtained through less onerous means. Corporations could have been required to file with the Secretary of State the location and address of its representative for service of process purposes.

The *McKinley* court therefore found:

> . . . that a statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce. These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find, for the reasons previously discussed, that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes.
>
> For all of the above reasons, the Court finds that Idaho Code 30-509 was unconstitutional under the Commerce Clause during the time that it was in effect prior to its repeal in 1979.

Richard Dean McKinley v. Combustion Engineering, Inc., *supra* at 13-14.

This Court agrees with the analysis of the *Coons* court and the court in *McKinley*. Regardless of whether the provisions of O.R.C. §2305.15 are analyzed under a *per se* test or a balancing test, this provision, as applied to defendant Heil-Quaker, violates the Commerce Clause. Under the *per se* test this provision violates the Commerce Clause by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense. Under the balancing test, the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce. The Court therefore finds that

the provisions of O.R.C. §2305.15 are unconstitutional, as applied to defendant Heil-Quaker, because they violate the Commerce Clause.

Plaintiffs have sought to distinguish the court's decision in *Coons* from the case sub judice on the grounds that New Jersey's statutory scheme is dissimilar to Ohio's. Plaintiffs have argued that Ohio's statutory scheme, unlike that of New Jersey, permits Ohio's Secretary of State to accept the appointment of a statutory agent for filing under the provisions of O.R.C. §111.6. This section provides in pertinent part as follows:

> The Secretary of State shall charge and collect, for the benefit of the state, the following fees:
>
> * * *
>
> (H) For filing any certificate or paper not required to be recorded, the sum of five dollars.

In support of this argument, plaintiffs have attached a letter written by Corporations Counsel for the Secretary of State of Ohio. This letter indicates in part:

> If, after thorough investigation into whether the foreign unlicensed corporation was doing business in Ohio, it is found that the corporation is truly interstate in nature, this office could accept the proposed designation of agent without requiring the foreign corporation to obtain a license.

The court in *Coons* was presented with a similar argument. While the Secretary of State had offered his opinion that no statutory procedure existed for a corporation engaged in interstate commerce to designate an agent without registering to do business in New Jersey, the Attorney General had given his opinion that *N.J.S.A.*

14A:1-6(4) constituted such a provision. The provisions of *N.J.S.A.* 14A:1-6(4) provide in relevant part as follows:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office.

The court held that foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because "that statute directs the Secretary to record documents that are filed as required or permitted by law. It does not independently authorize the filing of any documents." *Coons, supra,* at 12-13.

Plaintiffs in the present action assert that Ohio's statutory scheme differs significantly from New Jersey's because Ohio's Secretary of State may accept an appointment of a statutory agent for filing pursuant to O.R.C. §111.16.

The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mill, Corporations Counsel for the Secretary of State, dated December 22, 1983. to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation

might accept the designation of an agent from a corporation which has not registered to do business in Ohio.

In addition, the Court notes that the Secretary of State's opinion on the issue of whether a corporation engaged in interstate commerce can appoint an agent has changed during the course of this litigation. Defendant Heil-Quaker filed its letter also from Patricial Mill [sic], dated September 14, 1983, in which Ms. Mill [sic] indicated as follows:

> Pursuant to Sction [sic] 1703.041 O.RC., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State. A designation of agent filed by a foreign corporation which is not licensed in Ohio would necessarily be rejected by this office due to the provisions of Section 1703.191 O.R.C.

In light of the Court's finding that the provisions of O.R.C. §2505.10 violate the Commerce Clause, the Court does not reach defendant Heil-Quaker's due process argument. The Court will grant Heil-Quaker's motion to dismiss.

There is also pending in this matter defendant Sears' motion for summary judgment, plaintiffs' opposition thereto, defendant Sears' reply and plaintiffs' response.

Defendant Sears has moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. According to defendant Sears, plaintiffs failed to bring their claims for bodily injury within the two year statute of limitations set forth in O.R.C. §2305.11. Defendant Sears successfully made this same argument in C 83-682 in the District Court in

Minnesota. That court dismissed plaintiff's claims against defendant Sears on the grounds that those claims were barred by the applicable provision of the Minnesota statute of limitations.

The Court finds that no genuine issues of fact exist and defendant Sears is entitled to summary judgment as a matter of law on the grounds that plaintiffs' claims against it are barred by the statute of limitations. The applicable statute of limitations is set forth in O.R.C. §2305.10 which provides in pertinent part as follows:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Plaintiffs are clearly seeking to bring an action for bodily injury and not breach of contract. See *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 49 (1951). The Court rejects plaintiffs' argument that the applicable statute of limitations is set forth in O.R.C. §2305.07. Even if plaintiffs' arguments regarding the alleged disabilities of plaintiffs Dale and William Copley are accepted as true, plaintiffs failed to initiate their action within the two year period set forth in O.R.C. §2305.07.

The provisions of the Consumer Product Safety Commission Act, 15 U.S.C. §2072 et seq., do not establish plaintiffs' right to bring this action. Therefore, the Supreme Court's decision in *Bora v. Kerchelich*, 2 Ohio St. 3d 146, 443 N.E. 2d 509 (1983), is inapplicable in the case sub judice.

In addition, as defendant Sears points out, it had no knowledge of the alleged defective nature of the valve manufactured by defendant Honeywell until after plain-

tiffs filed this action. Therefore, defendant Sears had no duty towards plaintiffs under the provisions of CPSCA. The Court will grant defendant Sears' motion for summary judgment.

Finally, there is pending in this action defendant Honeywell's motion for summary judgment, plaintiffs' opposition thereto, defendant Honeywell's reply, and plaintiffs' response. Defendant Honeywell has also moved for summary judgment on the grounds that plaintiffs' claims against it are barred by the statute of limitations. Plaintiffs have alleged a private cause of action against defendant Honeywell under Section 23 of the Consumer Product Safety Act, 15 U.S.C. §2072. Plaintiffs, in the action they originally filed in Minnesota, alleged negligence, breach of express and implied warranties, and fraudulent concealment against defendant Honeywell. The court in Minnesota originally granted a motion for judgment on the pleadings filed by defendant Honeywell on the grounds that plaintiffs' claims against defendant Honeywell were barred by the statute of limitations. Plaintiffs then filed a motion for reconsideration in which they argued that the statute of limitations had been tolled by defendant Honeywell's fraudulent concealment of certain relevant facts. The District Court in Minnesota vacated its dismissal of plaintiffs' action against defendant Honeywell on the grounds that plaintiffs' case against defendant Honeywell should not be dismissed at the pleading stage and plaintiffs should be given an opportunity to develop it further. Defendant Honeywell then argued that plaintiffs' action should be dismissed on the grounds that plaintiffs, by filing two actions, had split their claims between this Court and the District Court in Minnesota. The District Court in Minnesota denied defendant Honeywell's motion to dismiss and ordered

the case transferred to this Court pursuant to the provisions of 28 U.S.C. §1404(a).

For the reasons previously stated in reference to defendant Sears' motion, the Court finds merit to defendant Honeywell's argument that the statute of limitations governing plaintiffs' claims is set forth in O.R.C. §2305.10 and that any tolling provisions set forth in O.R.C. §2305.16 are inapplicable in the case sub judice.

The Court, however, agrees with the Minnesota Court that it would be inappropriate at this stage of the proceedings to grant defendant Honeywell's motion for summary judgment because genuine issues of fact exist on the issue of whether defendant Honeywell fraudulently concealed from plaintiffs its alleged wrongful conduct.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Case No. C 83-682 and the above captioned case be, and hereby are, consolidated; and it is

FURTHER ORDERED that defendant Heil-Quaker's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Sears, Roebuck & Company's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Honeywell, Inc.'s motion for judgment on the pleadings or, in the alternative, summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that this cause be, and hereby is, set for pretrial on March 19, 1984 at 11:00 A.M.

/s/ JOHN W. POTTER
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Received by the Court of Appeals for the Sixth Circuit June 4, 1987)

Case No. 86-3360

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM COPLEY, *et al.*,
Plaintiffs-Appellants,

vs.

HEIL-QUAKER CORP., *et al.*,
Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Copley, Patsy Copley and Dale Copley, plaintiffs-appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit, dismissing the complaint entered in this action on May 20, 1987. Specifically, the appeal is taken from the final judgment of the United States Court of Appeals for the Sixth Circuit declaring the Ohio Savings Clause, Ohio Revised Code Section 2305.15, to be in violation of the Commerce Clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

JAMES T. MURRAY
MURRAY & MURRAY Co., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
PH: (419) 627-9700
Attorneys for Plaintiffs-Appellants

OHIO REVISED CODE

§ 2305.15 Saving clause.

(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

(B) When a person is imprisoned for the commission of any offense, the time of his imprisonment shall not be computed as any part of any period of limitation, as provided in section 2305.09, 2305.10, 2305.11, or 2305.14 of the Revised Code, within which any person must bring any action against the imprisoned person.

*HISTORY: 141 v S 151. Eff 7-9-86.

CONSTITUTION OF THE UNITED STATES

Art. I, § 8

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * *

STATUTES INVOLVED

28 U.S.C. § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

* * * * *

28 U.S.C. § 2103

§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

(June 25, 1948, c. 646, 62 Stat. 962; Sept. 19, 1962, Pub.L. 87-669, § 1, 76 Stat. 556.)